



THE UNIVERSITY *of* EDINBURGH

## Edinburgh Research Explorer

### Immanence and transcendence

**Citation for published version:**

Kennedy, C 2017, 'Immanence and transcendence: History's roles in normative legal theory', *Jurisprudence*, vol. 8, no. 3, pp. 557-579 . <https://doi.org/10.1080/20403313.2017.1381473>

**Digital Object Identifier (DOI):**

[10.1080/20403313.2017.1381473](https://doi.org/10.1080/20403313.2017.1381473)

**Link:**

[Link to publication record in Edinburgh Research Explorer](#)

**Document Version:**

Peer reviewed version

**Published In:**

Jurisprudence

**Publisher Rights Statement:**

This is an Accepted Manuscript of an article published by Taylor & Francis in Jurisprudence on 26 Oct 2017, available online: <http://www.tandfonline.com/doi/full/10.1080/20403313.2017.1381473>.

**General rights**

Copyright for the publications made accessible via the Edinburgh Research Explorer is retained by the author(s) and / or other copyright owners and it is a condition of accessing these publications that users recognise and abide by the legal requirements associated with these rights.

**Take down policy**

The University of Edinburgh has made every reasonable effort to ensure that Edinburgh Research Explorer content complies with UK legislation. If you believe that the public display of this file breaches copyright please contact [openaccess@ed.ac.uk](mailto:openaccess@ed.ac.uk) providing details, and we will remove access to the work immediately and investigate your claim.



## Immanence and Transcendence: History's Roles in Normative Legal Theory

### 1. Introduction: The dialogue between legal history and legal theory

Someone seeking to understand the relationship between history and theory in contemporary legal scholarship, or to make sense of the dialogue between legal historians and legal theorists, would be forgiven a little confusion. On the one hand, a growing body of academic work seeks to bring these two disciplines into conversation, or at least to reflect on the possibility of doing so.<sup>1</sup> On the other, progress, in the form of mutual appreciation, fruitful collaboration or even a deeper sense of what distinguishes these two disciplines, seems to have been limited. Generally speaking, the dialogue between legal history and legal theory is characterized by requests for greater attention to be paid towards history and, connectedly, that the spatial and temporal specificity of law and its practices be acknowledged. Historically-minded scholars lament the dominance of 'abstract', 'philosophical' legal theory and urge its practitioners to take account of their findings.<sup>2</sup> By contrast, calls for historically-minded scholars to become more theoretically literate are less frequent<sup>3</sup> and where they arise they are often presented as an aid to interpretation rather than as a challenge to the historian's method or ambition.<sup>4</sup>

This pattern is also evident within criminal law scholarship, where sophisticated arguments that underscore the importance of bringing socio-historical insights to bear on the task of legal theorizing have been made.<sup>5</sup> However, in spite of these pleas for greater historical sensitivity there have been limited signs of change.

---

<sup>1</sup> See, for example, Maksymilian Del Mar and Michael Lobban, *Legal Theory and Legal History* (vol 4) (Ashgate 2014); Maksymilian Del Mar and Michael Lobban, *Law in Theory and History: New Essays on a Neglected Dialogue* (Bloomsbury, 2016); a special edition of the *Virginia Law Review* on Jurisprudence and (Its) History (2015 101(4)); a special edition of *Critical Analysis of Law* on New Historical Jurisprudence and Historical Analysis of Law (2015 2(1)). On the relationship between legal philosophy and social sciences more generally see Kevin Walton, 'Legal Philosophy and the Social Sciences: The Potential for Complementarity' (2015) 6(2) *Jurisprudence* 231.

<sup>2</sup> See, for example, Brian Tamanaha, 'Necessary and Universal Truths About Law?' *Ratio Juris* (2017) doi: 10.1111/raju.12155.

<sup>3</sup> At least as regards legal philosophy. There is considerable literature on law and the philosophy of time (see Maks Del Mar, 'Modelling Law Diachronically' in Del Mar and Lobban, *Law in History and Theory* (n 1)) and there is much literature on the philosophy of history that could usefully be considered by legal historians, e.g. María Inés Mudrovcic, 'Time, History and Philosophy of History' (2014) 8 *Journal of the Philosophy of History* 217; Berber Bevernage, 'Tales of Pastness and Contemporaneity: On the Politics of Time in History and Anthropology' (2016) *Rethinking History* 1470; Christophe Bouton, 'The Critical Theory of History: Rethinking the Philosophy of History in the Light of Kosselleck's Work' (2016) 55 *History and Theory* 163-184.

<sup>4</sup> For example, the four chapters on 'The History of Theory' in Del Mar and Lobban, *Law in History and Theory* (n 1).

<sup>5</sup> The contributions of Nicola Lacey, Alan Norrie and Lindsay Farmer are key here, as is work by Arlie Loughnan.

These signs should not be ignored, for they are welcome developments, but they seldom flesh out in a meaningful way what it is that history is supposed to do to enhance the theoretical picture. For example, in a recently published volume on the 'New Philosophy of Criminal Law', the editors remark that philosophers of criminal law are 'increasingly recognizing that the tools and resources of other disciplines', including history, can be 'of use' in considering questions about punishment, criminal responsibility, and so on.<sup>6</sup> Exactly what it means to be 'of use' is left unexplored.

On top of this, there remains considerable disconnect between some historically-minded legal scholars and some legal theorists, as epitomized by the articulation by one legal philosopher of what she perceives to be the lessons offered by history. Prompted by Lacey's socio-historical study of criminal responsibility, which includes the exhortation that 'we cannot understand what responsibility is, or has been, unless we also ask what it has been "for" at different times and in different places', Ferzan, a renowned criminal law theorist, undertakes to follow this counsel. After consulting some academic literature on witch trials and the prosecution of animals, she concludes that these examples serve to show where we have gone wrong in the past. In contrast to Lacey's assertion that criminal responsibility is not a 'constant through time and space', Ferzan's examination of the history of criminal responsibility leads her to believe that responsibility is the 'fixed star' that 'shines light on the truth of when individuals ought to be punished, and casts shadows when our practices have led us astray'.<sup>7</sup>

Despite selecting some extreme examples, Ferzan appears to have attempted to follow Lacey's advice in good faith. So what accounts for the disjoint between their two perspectives? Why, in spite of presumably sincere attempts to foster a dialogue, do these two eminent scholars appear to be talking past one another, arriving at 'two different histories of criminal responsibility'?<sup>8</sup> One response might be that historically-minded and theoretically-minded scholars are simply engaged in different enterprises: they work within different parameters, have different measures of success and hope to achieve different ends.<sup>9</sup> This being so, they will reach diverging conclusions even when there is a common reliance on history. Whilst this response might have some explanatory value, in this paper I suggest that it does not provide the full picture, particularly insofar as it implies a certain unity within historical and theoretical projects that does not exist.<sup>10</sup> Furthermore, I argue that in order to attain this full picture we must shift our attention from the divide between history and

---

<sup>6</sup> Chad Landers and Zachary Hoskins, 'Introduction' in *The New Philosophy of Criminal Law* (Rowman & Littlefield 2016).

<sup>7</sup> Kimberley Kessler Ferzan, 'Of Weevils and Witches: What Can We Learn From the Ghost of Responsibility Past?' (2015) 101(4) *Virginia Law Review* 947.

<sup>8</sup> Ibid 956.

<sup>9</sup> Though some scholars challenge the distinction between history and theory (see, for example, Paul Kelly, 'Rescuing Political Theory from the Tyranny of History' in Marc Stears and Jonathan Floyd (eds), *Political Philosophy versus History? Contextualism and Real Politics in Contemporary Political Thought* (CUP 2011)), the distinction is commonly presupposed in legal scholarship, possibly because of the shift away from historical jurisprudence that occurred in the nineteenth century (see Brian Z Tamanaha, *A Realistic Theory of Law* (CUP 2017, ch 1).

<sup>10</sup> The same laxity in discussing theory (see Sionaidh Douglas-Scott, 'Legal Theory and Legal History: Which Legal Theory' in Del Mar and Lobban, *Law in Theory and History* (n 1)) often applies to discussions of history.

theory to a different divide – the divide between immanence and transcendence – which lurks within the disagreement between Lacey and Ferzan and indeed between legal theory (of some kinds) and legal history (of some kinds) more broadly.

The terms immanence and transcendence have long, complex histories and, as such, are capable of varied interpretation. In the context of this paper, I draw on the way these terms are used in ongoing debates over the rise and limitations of secularist political theory<sup>11</sup> and indeed within post-secular discourse more generally,<sup>12</sup> where tensions similar to those that afflict the dialogue between legal theory and legal history abound. More specifically, I use the terms to describe two different mindsets. The first, the immanent mindset, is marked by a privileging of the here and now. In the context of law, this ‘here and now’ includes prevailing legal thought, the various institutional and practical dimensions of law, the values embodied within these institutions and practices as expressed in their underpinning commitments and assumptions, and the values that dominate a particular place and time, i.e. the law’s political and social context. The transcendent mindset, on the other hand, is focused on the possibility of exceeding (transcending) the here and now.<sup>13</sup> Again, in the context of law this would entail the possibility of moving beyond prevailing legal thought, institutions and practices (including the values embedded within these) and political and social conditions. In this sense, the words ‘immanent’ and ‘transcendent’ can be understood as relative terms. They help describe the process of transcending, or at least trying to transcend, one set of arrangements and values to arrive at an alternative, preferable set.

A second meaning of immanence and transcendence relates to how these alternative values and arrangements are conceived. Do they transcend time and space? If so, does this imply that they exist in a distinct realm of meaning, separated from our temporal and physical reality – a realm of ideas or a realm of Divine transcendence, for example? Or are they time and place-specific? And are we required to treat them as such if we consider them to be part of our temporal and physical reality? In respect of these questions, the mainstream tendency since at least the eighteenth century has been to hypostasize an ontological split between the immanent world, which we occupy, and a transcendent realm that lies beyond it.<sup>14</sup> Thus, a commitment to values and ideals that transcend space and time has become synonymous with a certain disdain for the immanent world and its particular needs and problems. *Vice versa*, attending to the specificities of time and place, including the immanent world’s particular needs and problems, has become associated with a degree of skepticism as to the very existence of values and ideals that transcend space and time. We can see

---

<sup>11</sup> E.g. Mary-Jane Rubenstein, ‘Thinking otherwise: Secularity and the Liberal Arts’, (*The Immanent Frame*, 3 December 2009) <<http://blogs.ssrc.org/tif/2010/12/03/thinking-otherwise/>> accessed 26 May 2017.

<sup>12</sup> For example, Charles Taylor, *A Secular Age* (Belknap Press of Harvard University Press 2007).

<sup>13</sup> Niels Hendriks et al, ‘Anchoring and Transcendence: PD as an “enabler” in Quality of Life’ in *Proceedings of the 14th Participatory Design Conference: Short Papers, Interactive Exhibitions, Workshops - Volume 2* 37-40 (2016) doi: 10.1145/2948076.2948077; Regina Schwartz, ‘Introduction’ in Regina Schwartz (ed), *Transcendence: Philosophy, Literature, and Theology Approach the Beyond* (Routledge 2004).

<sup>14</sup> Glenn Hughes, ‘Transcendence and History: The Search for Ultimacy from Ancient Societies to Postmodernity’ (University of Missouri Press 2003) 171.

this reflected in the familiar is / ought problem, with immanence – the way things are – being firmly separated from transcendence – the way things should be.<sup>15</sup>

Despite having come under criticism in various circles,<sup>16</sup> this divide continues to animate discussions in legal theory, both on the side of neo-Kantians who prioritize the pursuit of ideal theory, unhindered by social reality<sup>17</sup> and those who propose empirically-grounded alternatives.<sup>18</sup> My suggestion in this paper is that the two divides between immanence and transcendence animate much of the discord that exists between legal theorists and historically-minded legal scholars and that they stymie the possibility of meaningful dialogue. This is especially true of the relatively neglected normative dimension of the dialogue: discussions pertaining to the difficult but important tasks of evaluating, critiquing and reforming law.<sup>19</sup> When it comes to these discussions, the relations between the two meanings of immanence and transcendence outlined above become clear. If, as I argue is the case, the normative tasks of evaluating, critiquing and reforming law *depend on* focussing on the possibility of transcending the here and now – what I describe as the transcendent mindset – then this, I would suggest, entails a commitment to the existence of values and ideals that can transcend the specificities of space and time. For example, even if a theorist were to consider currently prevailing institutional arrangements, and the values they reflect, to be normatively optimal, her conclusion would have to be reached within the critical space that is opened up by contemplating the possibility of moving past the here and now.

Without this gap, there is simply no room to assess whether current institutional arrangements and values are normatively desirable. It follows that this hypothetical theorist's allegiance cannot be based on the mere fact that these arrangements and values currently prevail, for this would be to close off the critical space within which normative appraisal occurs. Instead, her allegiance must be based on the concurrence between these arrangements and values and some ideal(s) – even if these are those that currently prevail – that she holds and considers capable of

---

<sup>15</sup> Daniel W Smith, 'Deleuze and Derrida, Immanence and Transcendence Two Directions in Recent French Thought' in Ioanna Kuçuradi et al, *The Proceedings of the Twenty-First World Congress of Philosophy* (vol 11) (Bowling Green State University Philosophy 2007) 123-130.

<sup>16</sup> For some attempts to bridge this gap see, for example, the various contributions to Regina Schwartz (n 13), in the context of law see, for example, Taekema et al (eds), *Facts and Norms in Law: Interdisciplinary Reflections on Legal Method* (Edward Elgar, 2016).

<sup>17</sup> E.g. Tadros, who focuses on the 'central idea of the institutions of criminal justice' to develop his account of how that idea is best realized (Victor Tadros, *Criminal Responsibility* (OUP 2007) 8).

<sup>18</sup> E.g. Melissaris, who contrasts ideal theory with the 'real world' of 'fact and belief' and assumes that principles and values that transcend space and time are 'true independently of experience' (Emmanuel Melissaris, 'Theories of Crime and Punishment' in Markus D Dubber and Tatjana Hörnle (eds), *The Oxford Handbook of Criminal Law* (OUP 2014) 356-357)).

<sup>19</sup> Though there is no categorical divide between normative and other types of legal scholarship, it is possible to distinguish normative, or predominantly normative, projects from those that are predominantly non-normative (on this point, see Wibren van der Burg, 'The Need for Audacious, Fully Armed Scholars: Concluding Reflections' in Taekema et al (eds) *Facts and Norms in Law* (n 16)).

transcending space and time. Whether these ideals are deduced in an *a priori* way, as is often assumed, or might be garnered from an examination of the world and its history is a point I will return to below, where I also consider the certainty with which these ideals might be apprehended and advanced. The important point for the time being is that normative theorizing, and any fruitful discussions about it, requires a focus on the possibility of transcending the here and now, which in turn depends on ‘buying in’ to the existence of ideals that transcend space and time.

This is significant because recent, influential work that advocates greater historical sensibility within legal theory, including normative legal theory, at least implicitly encourages what I describe as an immanent mindset. In doing so, it risks closing off contemplation of, and attempts to realize, any order of things that is significantly different to that which currently prevails. It does this in two ways that reflect the two related meanings of immanence and transcendence set out above. First, it highlights the contingency of legal concepts and practices in such a way that tends to erode belief in the existence of ideals that transcend space and time. This is a well-recognized effect of certain types of historical scholarship. Most notably, socio-historical scholarship, with its acceptance of empirical method as the basis for truth and realness and its sensitivity to context, has worked to discredit the possibility of speaking of truth that transcends temporal and physical limitations.<sup>20</sup> This kind of historical scholarship dominates contemporary academic legal discourse, contributing to the impression that historically-informed endeavours can be of little or no use in normative theorizing.<sup>21</sup>

Second, this recent, influential work encourages theorists to take account of existing legal institutions and practices in such a way that, without further elaboration, threatens to shrink the normative horizon so that it extends only to the particularities of here and now. The problem is that by using history in a way that encourages an immanent mindset, this type of scholarship effectively blocks the path to full normative engagement. In doing so, it hampers the possibility of fruitful dialogue with, or meaningful critique of, theorists who *are* engaged in the full range of normative enterprises. Ironically, by posing their challenge to normative theorists in these terms, these scholars also potentially undermine the contribution that history, including their own style of socio-historical research, might make to normative legal theory.

Failing to attend to the divide between immanence and transcendence has negative consequences at a more general level, too. Despite the association between historical scholarship and the immanent mindset, the divide between the two mindsets I describe does not map on to a neat disciplinary divide between historians and theorists. As I illustrate with some examples, these two mindsets arise within, and cut across, legal theory and legal history. An awareness of the difference between them

---

<sup>20</sup> Hughes (n 14) 1. On the anti-foundational tendencies of socio-historical scholarship see Kunal M Parker, ‘Law In and As History: The Common Law in the American Polity, 1790-1900’ (2011) 1 *University of California Irvine Law Review* 587.

<sup>21</sup> See, for example, ‘the historian cannot determine whether a Liberal Feminist vision is better than a Radical Feminist or a Cultural Feminist vision’ (Michael Lobban, ‘Prospects for Dialogue’ in Del Mar and Lobban, *Law in Theory and History* (n 1) 18). See also, ‘the socio has generally been conceived as a problematic that, through its modernist commitments, is distinct from and superior to ethical enquiry’ (Alan Norrie, ‘Law, Ethics and Socio-History: The Case of Freedom’ in Dermot Feenan (ed), *Exploring the ‘Socio’ of Socio-Legal Studies* (Palgrave MacMillan 2013) 61)).

can therefore help identify and explain examples of intra- as well as inter- disciplinary disagreement. Importantly, this suggests that paying attention to the specificities of time and place need not lead to adopting the immanent mindset. A normative theorist might attend to the particular needs and problems of her community without collapsing the critical space that is required for full normative evaluation. Furthermore, she might retain a belief in ideals that transcend space and time while remaining humble about our capacity to know these with certainty. She might also remain open to the possibility that these ideals can be discerned through examination of the immanent world, rather than being deduced wholly in the abstract. In other words, as I illustrate in section 3, she can reject the presumed associations between predominantly normative theorizing, ahistoricism, and ideal theory, and between predominantly non-normative theorizing, historical sensibility and cautious realism. She can instead show how, by adopting an approach to history that allows for the transmission of contentful meaning across time, it is possible to adopt a perspective, best described as immanent-transcendent, that allows, and encourages, a transcendent mindset while avoiding lapsing into transcendentalism.

The two key arguments of this paper are therefore that a transcendent mindset is required in order to engage in or talk meaningfully about normative theorizing and that there are different ways one might adopt a transcendent mindset, not all of which require neglecting the particularities of time and place or relying on *a priori* ideals. Crucially, however, belief in the possibility of ideals that transcend space and time but are not *a priori* depends on rejecting the notion that the immanent world we occupy is divorced from a transcendent realm of meaning and on rejecting the historicist notion that meaning cannot (other than perhaps in an extremely minimal sense) carry across different contexts. As long as scholars tend to endorse these two dominant positions, even implicitly, their arguments and inquiries will remain inclined to collapse into radical immanence, prioritizing the here and now to the exclusion of other possibilities, or radical transcendence, reifying and prioritizing a realm of pure ideas at the expense of attending to problems that arise and neglecting the insights that the past might offer. Recognizing this, the lesson this paper holds for scholars of all types is that it is essential to be explicit about one's metaphysical commitments and to reflect fully on the implications this holds for one's argument, both internally and with regard to its potency against arguments founded on altogether different metaphysical commitments. This, I would suggest, is a necessary stage in any attempt to establish a dialogue – constructive or critical – between history and theory and any failure to do this negatively affects both the efficacy and credibility of the message one seeks to convey.

## 2. The immanent mindset

Scholars adopting the immanent mindset, be they secularist political theorists or socio-historical scholars, 'entreat[] us to own up to what we all secretly know already: there is no transcendence to the temporal flux, no world of Forms outside Plato's cave. All we have are the shadows on the wall, and it is our task to arrange ourselves as harmoniously as possible in relation to them'.<sup>22</sup> To the extent that this perspective encourages attending to the temporal and spatial specificities of our lived reality, it is a valuable reminder of the folly of pursuing ahistorical universals. Nevertheless, it implies that doing justice to the specificities of time and place entails surrendering the

---

<sup>22</sup> Rubenstein, 'Thinking otherwise' (n 11).

purportedly naïve belief that there is some overarching meaning to the world we inhabit and the practices we undertake. According to this perspective, once this lesson is learned, the task then becomes how best to order our existence in accordance with the way things currently are.

Postponing consideration of whether it is possible to reject this entreaty without committing to a Platonic metaphysic (or any other perspective that conceives of a transcendent realm beyond the immanent world), the important point for present purposes is that when it comes to normative theorizing there are compelling reasons to resist the immanent mindset. Focussing so intently on what characterizes the here and now, and what is practical and feasible within that context, diverts the normative theorist's attention away from contemplating how things might be otherwise. Furthermore, foregrounding the vacillations in practices, concepts and values over time, and maintaining their incommensurability, makes it difficult for theorists even to rely on the longer traditions out of which existing practices and values have emerged. The result is that the scope of normative thinking is reduced so that it effectively extends only those arrangements and values that currently prevail. In other words, by highlighting the particularities of different contexts and denying, or at least minimizing, any cross-contextual sense of meaning, the immanent mindset reduces the theorists' normative tools to those that are particular to *this time* and *this place*.

This is problematic because the only form of normative project this way of thinking can comfortably accommodate is an immanent critique that assesses practices and institutions against the values and commitments they uphold, or purport to uphold, or against the values and commitments that are likely to be supported within the prevailing social and political climate. On top of its weak critical capacity, additional difficulties afflict this form of normative evaluation when it has been encouraged by reliance on the kind of history that erodes belief in the possibility of ideals that transcend space and time. Once the possibility of these ideals is eroded, the normative theorist is deprived of both the stable benchmark and the critical distance that are necessary to assess whether current practices and values are normatively desirable and worthy of her allegiance. In other words, the normative theorist is led to consider prevailing arrangements as prescriptive and simultaneously deprived of the capacity to judge their merit.

Recent debates in political theory have exposed some of the limitations of adopting an immanent mindset: the burgeoning field of realist political philosophy provides a powerful counterpoint to abstract, neo-Kantian theorizing but struggles to move beyond a pessimistic form of critique that reduces normative engagement to negotiation within the confines of a particular historical context. In the process, the critical distance that is required for full understanding and radical critique is drastically reduced.<sup>23</sup> The same dynamics appear to be affecting legal theory, so that the main alternative to abstract legal philosophy that has emerged is a cautious and hyper-realist form of theorizing that draws on socio-historical method and insights.

---

<sup>23</sup> See Bonnie Honig and Marc Stears 'The New Realism: From Modus Vivendi to Justice' in Stears and Floyd (eds), *Political Philosophy versus History?* (n 9), discussing the work of Bernard Williams and Raymond Geuss. See also Enzo Rossi, 'Reality and Imagination in Political Theory and Practice: On Raymond Geuss's Realism' (2010) 9(4) *European Journal of Political Theory* 504-512.



Two recent, highly influential,<sup>24</sup> contributions to the dialogue between history and theory help illustrate this claim. Both works, by Lacey and Farmer, use history in their respective analyses of criminal responsibility and criminalization, and both champion the role of history in the construction of normative legal theory. Each make important and compelling criticisms of philosophical theorizing that pays scant attention to the way that law and legal practice are institutionalized, and how this has changed over time. Both seem, however, to embrace the immanent mindset and therefore risk, through their reliance on history, closing off the two senses of transcendence outlined above.<sup>25</sup> By emphasizing the importance and specificity of prevailing institutional arrangements and values they both, by my interpretation, end up blocking the path to the full range of normative theorizing and, furthermore, risk becoming apologists for practices they might have no desire to support.<sup>26</sup>

For his part, Farmer argues that a normative theory of criminalization necessarily depends on the role and function that modern (post eighteenth-century) criminal law has acquired through its institutional deployment and according to its own self-understanding.<sup>27</sup> The nature of this dependence is not clear, but the conception of criminal law that Farmer ascribes to modernity, which is aimed at securing civil order, is said to ‘frame[] understandings of what is permissible and indeed what is possible’ and establish a ‘normative horizon for thinking critically about the criminal law’.<sup>28</sup> In addition, this conception of civil order is said to ‘shape and constrain the way that certain ends can be brought about’.<sup>29</sup> By my reading, this is to suggest that what is feasible according to prevailing legal practice and thought – its specific conception of civil order – should determine the limits of what is proposed, normatively. This interpretation is supported by Farmer’s clarification that, according to his argument, ‘actual systems of law act as a constraint on normative justifications’.<sup>30</sup> It is not only that existing arrangements and commitments affect the

---

<sup>24</sup> In addition to having been extensively reviewed, each work has been the subject of special edition book forums in *Critical Analysis of Law*.

<sup>25</sup> In respect of Lacey’s work, Postema believes that it subordinates philosophy to historical, social-legal inquiry (Gerald J Postema, ‘The Sociable Science’ (2015) 11(5) *Virginia Law Review* 869-901 at 890).

<sup>26</sup> Lacey’s work highlights the contingency and incommensurability of concepts, such as responsibility, and values, such as legality and the rule of law, across time (Nicola Lacey, *In Search of Criminal Responsibility: Ideas, Interests, and Institutions* (OUP 2016) 197-198; Nicola Lacey, ‘HLA Hart’s Rule of Law: The Limits of Philosophy in Historical Perspective’ (2007) 36 *Quaderni Fiorentini* 1203). Farmer wants to hold on to the distinctions between different moments across the liberal tradition, and the debates and theories these have generated (Lindsay Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* (OUP 2016) 3) and encourages awareness of the contingency of particular values (Lindsay Farmer, ‘Making the Modern Criminal Law: A Response’ (2017) 4(1) *Critical Analysis of Law* 53 at 54).

<sup>27</sup> Lindsay Farmer, ‘Criminal Law as an Institution’ in Duff et al (eds), *Criminalization: The Political Morality of the Criminal Law* (OUP 2014) 83 and Farmer, *Making the Modern Criminal Law* (n 26) ch 1.

<sup>28</sup> Farmer, *Making the Modern Criminal Law* (n 26) 302.

<sup>29</sup> Farmer, ‘Criminal Law as an Institution’ (n 27) 90.

<sup>30</sup> Farmer, ‘Making the Modern Criminal Law: A Response’ (n 22) 54.

realization of normative theories; they constrain the justifications of these theories too.

A similar message is offered by Lacey. On one hand, Lacey maintains that changes in the law, and an explanation their causes, can be ignored by normative theorists on the basis that this historical awareness has no bearing on their theories' normative credentials.<sup>31</sup> On the other, she argues that 'it is obvious that the normative recommendations of particular principles...are to some degree founded in social facts...and vary in their strength with these founding conditions'.<sup>32</sup> This suggests that, in Lacey's view, contemporary 'social facts' set the parameters of normative theorizing. This interpretation is supported by the importance that the feasibility of normative principles – the likelihood that they might be realized in the world as it stands – holds in Lacey's account. According to Lacey, theorists 'must engage' with the fact that the 'context of interests and institutions...shapes the social practices' and reflect on the implications this context therefore holds 'for the feasibility of our normative vision of criminal law'. Even theorists who are not reform-oriented must 'surely, be concerned with the conditions under which those [their] principles and values will be most likely to survive'.<sup>33</sup>

What it means to be concerned with these conditions is not fully spelled out and it is here that the liability to fall into the immanent mindset becomes clear. In respect of reform efforts, there is surely a need to consider the institutional and social viability of normative ideals, but if efficacy becomes the overriding concern there is a danger that large scale change, which might be *possible*, even if not feasible, disappears from view. Too much focus on efficacy also has a stifling effect on the ideals that necessarily underpin reform efforts. If these ideals must be those that are likely to be accepted, according to prevailing legal, political and social practices and values, then there is little to no critical space within which to evaluate whether they are the most normatively desirable.<sup>34</sup> Furthermore, there is no reason why the aspirational (utopian) and regulative (critical and evaluative) dimensions of normative thinking must be constrained by feasibility.<sup>35</sup> Given that utopian, evaluative and reform-oriented thinking are all vital aspects of normative theorizing, suggesting that theorists confine their efforts to truncated versions of critique and reform is to avoid engaging with the full scope of normative theorizing. The normative imagination is simultaneously considerably reduced.<sup>36</sup>

---

<sup>31</sup> Lacey, *In Search of Criminal Responsibility* (n 26) 186.

<sup>32</sup> Ibid 178.

<sup>33</sup> Ibid 185.

<sup>34</sup> Weber notes a difficulty with constructivist approaches to international relations (Martin Weber, 'Between 'isses' and 'oughts': IR constructivism, Critical Theory, and the challenge of Political philosophy' (2014) 20(2) *European Journal of International Relations* 516).

<sup>35</sup> On this point, see the discussion of 'hypological oughts' in Nicholas Southwood, 'Does "Ought" Imply Feasible?' (2016) 441(1) *Philosophy & Public Affairs* 7 at 28-44.

<sup>36</sup> It is worth noting that in earlier work Lacey endorsed the full range of normative theorizing, including critique, utopianism and reformism (see Nicola Lacey, 'Normative Reconstruction in Socio-Legal Theory' (1996) 5(2) *Social and Legal Studies* 131 at 134 and Nicola Lacey, 'Closure and Critique in Feminist

These consequences are ironic for at least two reasons. First, close attention to the historical practice of normative theorizing reveals that utopian thinking and the desire (and occasionally the ability) to transcend given social, legal and political arrangements are long-standing features of the human condition.<sup>37</sup> Thus, historically-minded scholars would surely advocate attending to these dimensions of normative theorizing. Second, it is not clear that either Lacey or Farmer want to advocate such a close association between normative theorizing and prevailing legal and political values and institutions. Farmer sees his contribution to normative theorizing as augmenting the range of critical resources that might feed in to a public conversation of the kind of law we wish to have<sup>38</sup> and Lacey is clear that the methodology she employs is not meant to undermine the importance of normative or evaluative projects.<sup>39</sup> Yet both accounts assign existing practices and commitments a quasi-prescriptive role in a way that seems to reduce the normative resources available and run counter to their dismissal of progressive conceptions of history.<sup>40</sup> This undergirding of contemporary arrangements also jars somewhat with Lacey's criticism of recent responses to serious crime and terrorism.<sup>41</sup>

The fact that these recent developments are at least partly the product of democratic politics<sup>42</sup> underscores the inability of adherence to this form of political process<sup>43</sup> or to procedural norms of lawmaking – benchmarks that some critics of abstract moral theorizing, including Farmer,<sup>44</sup> posit as providing alternative normative

---

Jurisprudence: Transcending the Dichotomy or a Foot in Both Camps?' in Alan Norrie (ed), *Closure or Critique: New Directions in Legal Theory* (Edinburgh University Press 1993) 209). It seems possible that Lacey's turn to socio-history might have encouraged this shift.

<sup>37</sup> See Robert A Davis, 'Education, Utopia and the Limits of Enlightenment' (2003) 1(3) *Policy Futures in Education* 565; Jolyon Agar, *Post-Secularism, Realism and Utopia: Transcendence and Immanence from Hegel to Bloch* (Routledge 2014).

<sup>38</sup> Farmer, 'Making the Modern Criminal Law: A Response' (n 26) 60.

<sup>39</sup> Lacey, *In Search of Criminal Responsibility* (n 26) 191.

<sup>40</sup> E.g. Farmer, 'Criminal Law as an Institution' (n 26) 93 and *Making the Modern Criminal Law* (n 26) 116; Lacey, *In Search of Criminal Responsibility* (n 26) 8. Farmer rejects a narrative of decline while warning against assuming the inherent superiority of our own understandings (Farmer, *Making the Modern Criminal Law* (n 26) 113; 224-227).

<sup>41</sup> Lacey describes these as 'reminiscent of the extreme form of character responsibility...we might have hoped to have been laid to rest along with the *ancien régime*' (Lacey, *In Search of Criminal Responsibility* (n 26) 204).

<sup>42</sup> For example, recent legislation criminalizing conduct associated with terrorism was 'enacted in the wake of public anxiety about global terrorism' (Lacey, *In Search of Criminal Responsibility* (n 26) 152). More generally, the ability of political dialogue to be skewed is a recognized danger of political constructivism (Melissaris, 'Theories of Crime and Punishment' (n 18) 364-365).

<sup>43</sup> For an historical account of liberal neutrality and civic order that explicitly champions these features of modernity and shows that they do *not* entail commitment to democracy see Ian Hunter, 'Is Metaphysics a Threat to Liberal Democracy? On Richard Rorty's "The Priority of Democracy to Philosophy"' (2000) 95 *Theoria: A Journal of Social and Political Theory* 59.

<sup>44</sup> Farmer, *Making the Modern Criminal Law* (n 26) 303.

justification for the law – to provide much in the way of substantive evaluation. Of course, those who believe that political values constitute the law's most appropriate normative foundations might eschew substantive evaluation of the law altogether. According to this view, so long as the process for deciding what the law constitutes is fair, 'according to an appropriately political conception of fairness', the law is normatively justified.<sup>45</sup> Even if we ignore the fact that much normative theory is concerned with developing arguments that pertain to law's substance, however, it is important to remember that these substantive arguments constitute part of the necessary fodder for the democratic decision-making process.

With the aim of giving voice to a plurality of views, democratic decision-making is surely enhanced by suggestions for how to transcend given practices and commitments: an immanent mindset that works to discourage these is therefore antithetical to the process.<sup>46</sup> Furthermore, inescapable questions about how to evaluate and improve the *political process itself* reintroduce the same issues and concerns that are implicated in respect of critiquing and improving the substantive law, i.e. how to keep open the possibility of evaluating and altering current arrangements in accordance with ideals that transcend place and time. As such, even advocates of political constructivism (the idea that law should be grounded in the terms on which citizens of a political community regard themselves as members of that community) accept that the 'the outer framework of the institutional [political] structure' is to be determined philosophically (i.e. independently of the empirical context)<sup>47</sup> and the political principles advanced by a theorist will be those she favours,<sup>48</sup> rather than those that prevail. For reasons I explain in the following section, it is not necessary to conclude that this outer framework must be determined independently of empirical context but these observations highlight how, at the level of political institutions, procedural stipulations and other blanket commitments, such as human rights and equality, the immanent mindset is equally damaging.<sup>49</sup>

These points illustrate how relying on history in a way that encourages an immanent mindset is liable to result in the (perhaps unintended) undermining of normative theorizing that aspires to engage in full critical evaluation. That this should occur seems to be attributable to an elision of the processes of *understanding* concepts, practices and values and *committing* to them. In other words, the insight that attention to context or some more encompassing analogue, such as social imaginary or lifeworld, is central to fully comprehending concepts, practices and values is easily

---

<sup>45</sup> Vincent Chiao, 'Making Modern Criminal Law Theory: Reflections on Farmer' (2017) 4(1) *Critical Analysis of Law* 1 at 7. Farmer also believes that it is not for the theorist to provide a prescriptive account of what the law should be (Farmer, 'Making the Modern Criminal Law: A Response' (n 26) 60).

<sup>46</sup> On how similar notions of spatialization and temporalization serve to undermine the pluralism Williams champions, see Honig and Stears 'The New Realism' (n 23).

<sup>47</sup> Melissaris, 'Theories of Crime and Punishment' (n 18) 363.

<sup>48</sup> As Chiao points out, Hart argued that criminal responsibility should be grounded in political, rather than moral, principles: '*in his case*, liberty as the ability to plan one's affairs' (Chiao, 'Making Modern Criminal Law Theory' (n 45) 7 (emphasis added)).

<sup>49</sup> Cf theorists who argue for the universality of these values e.g. Neil MacCormick, *Institutions of Law: An Essay in Legal Theory* (OUP 2007) 273 and Daniel Chernilo, 'Jürgen Habermas: Modern Social Theory as Postmetaphysical Natural Law' (2013) *Journal of Classical Sociology* 254.

transposed into the altogether different assertion that context is central to committing to such concepts, practices and values. But this latter assertion is unwarranted. As Fasolt has argued, normative judgments about law and justice are made within a particular political community that is underpinned by certain shared perceptions and criteria. But what one *says* within that particular political community need not demonstrate one's commitment to it: one's commitment may be to 'some other political community. It need not even be an actually existing political community. It may be a future political community existing 'nowhere besides our imagination'. What this means is that when it comes to expressing commitments to values and practices, which is central to much normative theorizing, we need not consider ourselves bound within 'hermetically sealed communities'.<sup>50</sup> We should remain capable of committing to, and advocating, a truly different order of things. Of course, the political community one inhabits may reject one's commitments but, as noted above, accordance with prevailing sensibilities is not a requirement of full normative theorizing.

These reflections on the differences between understanding and commitment underscore the points made above about both senses of transcendence. Even if a normative theorist must pay attention to the specificities of her particular time and place in order to fully understand the nature of the practices and values she undertakes to evaluate, critique or reform, she must be focussed on the possibility of transcending them, both in terms of their potential alteration and, connectedly, in terms of committing to values and practices that transcend time and place. Even if she finds no fault within existing arrangements, this conclusion (however unlikely) must be based on their concurrence with the ideals she favours: ideals that can cut across space and time. The source of these ideals, and the certainty with which she asserts them, will vary depending on how they are conceived but they must exist, and they must be deployed in the critical space that is opened up when one's focus extends beyond the arrangements that currently prevail, i.e. when one embraces a transcendent mindset.

### 3. The transcendent mindset

The insistence that it is essential to embrace a transcendent mindset must take account of two familiar and longstanding concerns with the belief in ideals that transcend space and time. First, that when these ideals are considered to be part of some other realm of meaning, entirely separated from the world and experience, they induce disinterest in the immanent world and its problems.<sup>51</sup> Second, that when these ideals are considered knowable with absolute certainty they will be asserted as such, thereby raising the spectre of tyranny and discouraging the quest for any subsequently different order of things.<sup>52</sup> In other words, the worry is that believing in, and pursuing, ideals that transcend space and time leads to absolutism and myopia – myopia as to

---

<sup>50</sup> Constantin Fasolt, 'History, Law, and Justice: Empirical Method and Conceptual Confusion in the History of Law' (2015) 5 *UC Irvine Law Review* 413 at 456-457.

<sup>51</sup> Charles Capper, "'A Little Beyond': The Problem of the Transcendentalist Movement in American History' (1998) 85(2) *The Journal of American History* 502; Hughes (n 14) 144.

<sup>52</sup> Rubenstein, 'Thinking otherwise' (n 11); Adam Kotsko, "'That They Might Have Ontology': Radical Orthodoxy and the New Debate' (2009) 10(1) *Political Theology* 115.

the very real concerns of the world we inhabit and myopia as to the fact that the search for ideals is a process that does not necessarily have a clearly fixed end point.

There is no reason to suppose, however, that these are necessary corollaries of belief in such ideals. Nor is there any reason to suppose that reliance on history, which fosters an awareness of contingency and context, must work to erode belief in the existence of such ideals. To avoid these conclusions, however, it is necessary first to reject the notion that transcendent meaning and the immanent world are absolutely separate and, following this, to make use of history in alternative way. These alternative ways of using history must open up the critical space within which it is possible to evaluate existing legal and political practices and values and must be capable of supporting the search for the transcendent ideals that are needed to reimagine and robustly critique these practices and values. The question, then, is how might these alternative ways of using history be conceived.

One option is to follow a Derridean model that aims to navigate a path between 'Platonism (and its related idealist and intellectualist variations) and conventionalism (and its related empiricist and historicist variations)'.<sup>53</sup> The aim here would therefore be to avoid relying on Derrida in the way that the majority of legal scholars, particularly critical legal scholars, have to date, i.e. to highlight the political issues of law's violence and absence of justice, and to concentrate instead on how his work might be used constructively in contemplating the foundations of law's authority and the possibility of justice.<sup>54</sup> Relied on in this way, Derrida offers a means of conceiving of an ideal – justice – that avoids collapsing into either the Platonic assertion that justice exists utterly independently of historic convention, that can be known through rational cognition alone and expressed with certainty, or the conventionalist assertion that justice amounts to nothing more than arbitrary convention. Instead, justice is considered to be present in what we do and in existing (past and present) laws. However, in experiencing the inadequacy of law we necessarily appeal to some other, more adequate law.<sup>55</sup>

We must therefore believe in the existence of this ideal of justice even if we cannot necessarily verbalize it clearly or know it with absolute certainty. According to this view, the decision to commit to a vision of justice is ultimately something of a leap in the dark.<sup>56</sup> As Rubenstein argues through her consideration of Derrida's discussion of hospitality, regulative ideals – the pure, unconditional sense of the concepts under consideration e.g. hospitality or justice – are necessary to evaluate, reimagine and even expound our imperfect attempts to accord with them. But these pure, unconditional ideals can only be known through our flawed efforts to attain them throughout the course of human history. Once grasped, however imperfectly, they are to be deployed in the service of striving to improve (again, imperfectly)

---

<sup>53</sup> Simon Glendinning, 'Derrida and the Philosophy of Law and Justice' (2016) *Law and Critique* 187 at 191. On the mutual dependence of the socio-historical and meta-ethical in Derrida's critical approach see Chris Lloyd, 'Derrida's Law: The Socio-Historical and the Meta-Ethical; La and Le Politique' (2017) 26(2) *Social & Legal Studies* 208.

<sup>54</sup> Glendinning, 'Derrida and the Philosophy of Law and Justice' (n 53).

<sup>55</sup> Ibid 197.

<sup>56</sup> Ibid 196-200.

existing practices and institutions in the world.<sup>57</sup> In these respects, the changing course of history is absolutely key to normative theorizing but its significance depends on belief in the existence of ideals that can transcend the particularities of space and time and on commitment to the notion that they can be known through specific efforts to instantiate them. Conceived of this way, existing legal systems operate less to constrain normative theorizing than as a guide – and nothing more to that – to an ideal that exceeds them.

These two commitments resonate with Benjamin's notion of the dialectic image – a way of bringing 'then' and 'now' together in order to interrupt the present<sup>58</sup> that has recently been proffered as offering a way to escape the potentially stultifying effects of socio-historical research and invoke the power of history to provide opportunities for change.<sup>59</sup> The sense of time at work in the dialectical image is Messianic and so must be interpreted in light of Benjamin's understanding of this concept.<sup>60</sup> Scholarly interpretation of Benjamin's work suggests that the Messianic, understood in different works as 'the history of the oppressed' and 'the eternal', discloses itself in history. This disclosure does not occur through a gradual process of revelation, however. Rather, the eternal breaks through, or traverses, the transient without ever being contained by it. In other words, the eternal is a feature of immanence but not reducible to it.<sup>61</sup> As with Derrida's justice, Benjamin's Messianic offers a possibility for redemption that is manifest in the world but not as clearly defined ideals that can be known with certainty. It is evident when transience, the demise of things, is combined with happiness – a state of life that resembles the Aristotelian *eudaimonia*.<sup>62</sup> This is what makes Benjamin's conception of history suited to supporting the full range of normative theorizing: it is concerned with the passing from one place to another and provides a grounding on which to conceive of ethical progress without turning its back on empirical history. Indeed the opposite is true: Benjamin's Messianic provides a metaphysics of experience.<sup>63</sup>

An even earlier, though just as topical, example is Smith.<sup>64</sup> Central to Smith's jurisprudential thought is the notion of natural justice, which is distinct from, and considered the proper basis of, positive laws. According to Smith's theory of natural justice, its principles are those of the impartial spectator, as discerned through spectatorial sympathy with others and consultation of previous attempts to approach the standpoint of the impartial spectator, including within laws. Importantly, the

---

<sup>57</sup> Mary-Jane Rubenstein, *Strange Wonder: The Closure of Metaphysics and the Opening of Awe* (Columbia University Press 2011) 142-144.

<sup>58</sup> See Max Pensky, 'Method and Time: Benjamin's Dialectical Images' in David S Ferris (ed), *The Cambridge Companion to Walter Benjamin* (CUP 2004).

<sup>59</sup> E.g. Chris Tomlins, 'After Critical Legal History: Scope, Scale, Structure' (2012) 8 *Annual Review of Law and Social Science* 31.

<sup>60</sup> On some alternatives to linear time that connect the present with a deeper, more stable sense of meaning see Hughes (n 14) chs 3 and 4.

<sup>61</sup> Judith Butler, 'One Time Traverses Another' in Colby Dickinson and Stéphane Symons (eds), *Walter Benjamin and Theology* (Fordham University Press 2016).

<sup>62</sup> Annika Tiem, 'Benjamin's Metaphysics of Transience' in Dickinson and Symons (n 61).

<sup>63</sup> Ibid.

<sup>64</sup> For one indication of the revival of interest in Smith see a special edition of the *Journal of Scottish Philosophy* 'Adam Smith: Context and Relevance' (2017) 15(1).

naturalness of natural justice means that it is in some sense universal and impermeable to social change.<sup>65</sup> This allows it to operate as a standard with which to evaluate legal practices and systems.<sup>66</sup> Despite his awareness of diachronic fluctuations within law and society,<sup>67</sup> Smith therefore retained space for the sense of justice capable of transcending space and time that was necessary to support his critical project.

The question of whether and how Smith's account of natural justice can avoid collapsing into mere conventionalism has led to disagreement between Smith scholars. If the process of attaining the viewpoint of the impartial spectator – spectatorial sympathy – involves concurrence between the sentiments of members of a community, how is it possible to identify instances of communal morality going awry? This is something Smith's theory had to accommodate if it was to succeed in avoiding the relativism threatened by Hume's theory of justice – a directing ideal, consisting of little more than a few universal test-principles, which necessarily refer to the existing value system of a society<sup>68</sup> – while attending to historical change and contingency in a way that later philosophers who relied on his work did not.<sup>69</sup> The answer appears to be that, according to Smith, insight into real propriety, where this differs from the generally prevailing norms of a community (and, to be clear, in Smith's view this would seldom be the case), could be attained through wisdom and virtue. Such wisdom and virtue is achieved through self-command, extensive knowledge and adopting a point of view that encompasses all of humankind, rather than a particular community.<sup>70</sup> Again, as with Derrida and Benjamin, Smith considered it impossible to achieve absolute certainty with regard to this kind of evaluation, and he afforded historical and experiential knowledge a central role in the search for natural justice.<sup>71</sup> Natural justice is therefore neither ahistorical nor *a priori*. Similarly, Smith had no expectation that his ideal theory of law would become reality – piecemeal progress towards building the principles of natural justice into

---

<sup>65</sup> Smith did not use the term 'natural' to denote a state of nature, nor did he use it in the same way as traditional natural lawyers – he used it to refer to the tendency of humankind to generate rights, which formed the core of justice, independently of government (Knud Haakonssen, 'The Lectures on Jurisprudence' in Ryan Patrick Hanley (ed), *Adam Smith: His Life, Thought and Legacy* (Princeton University Press 2016) 60).

<sup>66</sup> Knud Haakonssen, *The Science of a Legislator: The Natural Jurisprudence of David Hume and Adam Smith* (CUP 1989) 136, 148-151.

<sup>67</sup> Ibid ch 7.

<sup>68</sup> Ibid 43, 153.

<sup>69</sup> For example, Dugald Stewart, who used much of the same terminology as Smith but to different effect, i.e. to the effect that moral qualities are immutable and objective, and that both justice and utility are ahistorical universal principles (Knud Haakonssen, *Natural Law and Moral Philosophy: From Grotius to the Scottish Enlightenment* (CUP 1996) ch 7).

<sup>70</sup> Christel Fricke, 'Adam Smith: The Sympathetic Process and the Origin and Function of Conscience' in Christopher J Berry et al, *The Oxford Handbook of Adam Smith* (OUP 2013) 20-22.

<sup>71</sup> Ibid.



historically specific systems of law, with temporally specific needs and demands, was the most that could be expected.<sup>72</sup>

Despite their differences, these accounts are, broadly speaking, unified in the way they allow critical distance from existing practices and values and leave room for the belief in ideals that transcend space and time without losing sight of the importance of particularity and change and without laying claim to absolute certainty. They can therefore facilitate the normative theorizing in all its forms, providing benchmarks (albeit imperfectly known ones) with which to undertake robust evaluation and orient reform efforts (always with the knowledge that wholesale reform is not possible). Furthermore, they do this while encouraging neither disdain for empiricism nor the threat of absolutism. What enables this combination of attention to context and commitment to the existence and enduring nature of values like justice or happiness is that it is *through* an examination of history that the ideals, in imperfectly realized form, are discernible. As Cotterrell has argued, this requires an examination of context: ‘it is not illegitimate to seek, in a text from an earlier historical time or written in a different culture, meanings that can transcend that time or culture; but those meanings are unlikely to be found unless context is taken seriously in interpreting the aims, meaning and scope of the text’.<sup>73</sup> Likewise, as Lacey and Farmer point out, the contemporary space in which these ideals come to be discussed and potentially applied is characterized by its own peculiarities, which affect the palatability of the ideals and how they might plausibly be institutionalized. None of this implies, however, that the theorist should be limited to producing, or articulating, normative principles that reflect or are shaped to fit the legal or political practices, values or institutions of her time and place.

Taken together, these observations suggest some answers to questions recently posed about the extent to which normative theorizing must attend to historical contingencies: ‘is it, modestly, a matter of seeing how such historical contingencies make a difference to the practical application and implications of a set of ahistorical, non-contingent, normative principles; or is it, more radically, a matter of grounding the normative principles themselves in particular historical settings?’<sup>74</sup> The answers suggested are ‘neither’ and ‘these are not the only alternatives’. To the extent that normative theorizing is aimed at reform, it should of course pay attention to the ways in which institutional and political specificities influence the uptake of proposals. But in addition to offering lessons in how proposals might ‘take root’, an examination of history might also provide insight into what it is we should be trying to plant – the ideals embodied in the proposals. In this way, although the ideals will transcend space and time, they will not be ahistorical, at least insofar as this can be taken to imply disregard for history or indeed for the testimony of experience more generally.

And when it comes to these ideals, the theorist cannot only be concerned with what is feasible because that would be to foreclose the possibility that any radically different order of things might come to obtain. Furthermore, outside of reform efforts, ideals have a regulative role to play in facilitating the robust evaluation and critique that are part of the full normative repertoire. This is why the suggestion that the

---

<sup>72</sup> Haakonssen, ‘The Lectures on Jurisprudence’ (n 65) 64.

<sup>73</sup> Roger Cotterrell, ‘Lundstedt’s Swedish Legal Realism’ in Del Mar and Lobban, *Law in History and Theory* (n 1) 150.

<sup>74</sup> R A Duff et al, ‘Introduction’ in Duff et al (n 27) 5.

normative principles be grounded in particular historical settings is also deficient, insofar as it can be interpreted as implying that the normative principles be grounded in the values and practices of the particular time and place in which the theorizing occurs. If these principles must be those of the theorists' own time and place then the critical distance required for robust evaluation disappears. For this reason, normative theorizing must remain focussed on the possibility of transcending prevailing circumstances in both senses outlined at the start of this paper: bringing about an alternative set circumstances that are closer to an ideal, however imperfectly grasped and unclearly known, that extends beyond the peculiarities of time and place. This is why even though historical settings distinct from those in which normative theorizing occurs might provide insights into this, the normative principles that are expounded by the theorist will not be grounded in *those* historical settings either. They will be grounded in the belief that the ideal transcends these settings.

#### 4. Conclusion

Under modern conditions, where transcendent meaning and immanent reality are often conceived of, and portrayed as, utterly divorced, the challenge we face is how to avoid 'degrading immanent reality' in favour of a 'more perfect transcendent realm', while nevertheless managing to avoid 'denying the fact or implications of transcendence'.<sup>75</sup> The search for transcendent meaning has not left us, and will not leave us. When we deny it, we are merely led to imbue something wholly immanent – current political or legal arrangements, for example – with transcendent meaning.<sup>76</sup> There is then a risk that these arrangements become prescriptive and even acquire the kind of peremptory force that traditional metaphysics ascribes to rational and logical deductions. Frequently, and problematically, the only alternative that is considered is some kind of transcendentalism that demands certainty and decries the relevance of history and experience.

This tendency to collapse into either immanence or transcendentalism across works of legal theory as well as legal history. For example, rational reconstruction, which occupies a central place within legal theory, is generally understood as the process of making sense of, and imposing order on, legal materials by interpreting

---

<sup>75</sup> Hughes (n 14) 130.

<sup>76</sup> Ibid 164. In addition to the examples given in section 1, see, for example, Foucault's search for the historical *a priori*. Although Foucault aimed to undermine essentialism and absolutes, his desire to understand the conditions that made possible and governed the formation of discourses meant that rather than merely describing the rules of discourse, Foucault ascribed to them a particular kind of efficacy: they became the rules the discourse was bound to obey at a given time and place. The resulting regression led Foucault to rely, on later work, on the concept of power, which provided him a foundation for the regulatory role he assigned to discourse (Béatrice Han (Edward Pile (trans), *Foucault's Critical Project: Between the Transcendental and the Historical* (Stanford University Press 2002); Béatrice Han, 'Reply to Gary Gutting's review of Foucault's Critical Project: Between the Transcendental and the Historical' <[http://privatewww.essex.ac.uk/~beatrice/Gutting%20answer\\_%202003-05.pdf](http://privatewww.essex.ac.uk/~beatrice/Gutting%20answer_%202003-05.pdf)> accessed 26 May 2017; Mark Kelly, 'Review of Foucault's Critical Project: Between the Transcendental and the Historical' (2004) 1 *Foucault Studies* 92.

them in their best light. Yet despite this uncontentious definition, there are diverging views on what this requires. Displaying what I would describe as an immanent mindset, MacCormick saw the work of rational reconstruction as transforming legal material into a coherent and well-ordered whole and although he also ascribed moral and political judgments a central role in this process,<sup>77</sup> the moral and political values that steered this undertaking appear to be those prevailing at the time of reconstruction.<sup>78</sup> Similarly, Cotterrell describes the task of jurisprudence as ‘making organised social regulation a valuable practice, rooted and effective in the specific contexts and historical conditions in which it exists but also aimed at serving demands for justice and security...as these perennial values are understood in their time and place’.<sup>79</sup> What is crucial here is that the values of justice and security are conceived as particular to time and place and their contemporary interpretation is afforded priority: ‘however wide these jurisprudential inquiries become, they start from and must relate back to conditions of legal practice and experience in their particular time and place’.<sup>80</sup>

In contrast, for Priel the processes of articulating institutional practice and presenting it in its best light are bound together by the theorist’s overarching first-order normative commitments. The theorist’s account of what makes law valuable, as determined through recourse to moral or political philosophy, drives the interpretive effort and many legal phenomena are eliminated in the process.<sup>81</sup> These commitments must be related to the legal practice under consideration for the method to be considered interpretation in any true sense, but priority is afforded to the normative vision and a considerable amount of empirical inaccuracy is deemed acceptable.<sup>82</sup> This view is broadly shared by Victor Tadros, for whom the aims of rational

---

<sup>77</sup> Neil MacCormick ‘Rational Reconstruction after Deconstruction: Closing in on Critique’ in Norrie, *Closure or Critique* (n 77) 155. It is not always clear how far MacCormick’s rational reconstruction requires reliance on extra-legal considerations. On one reading, it seems confined to drawing on the values that the legal institutions aim to protect or promote, but MacCormick saw law as connected to some ‘moral, or morally defensible, conception of justice’, understood not in absolute terms but as reflected in the moral underpinnings of given social practices (Massimo La Torre, ‘Institutional Theories and Institutions of Law: On Neil MacCormick’s Savoury Blend of Legal Institutionalism’ in Maksymilian Del Mar and Zenon Bankowski (eds), *Law as Institutional Normative Order* (Ashgate 2009)). Either way, commitment to contemporary values, legal or more broadly, seems to be at the core of MacCormick’s version of rational reconstruction.

<sup>78</sup> Hence, Tadros’ assertion that MacCormick should have outlined in more depth his own commitments with respect to justice, rather than his views about the institutional character of law (Victor Tadros, ‘Institutions and Aims’ in del Mar and Bankowski (eds) *Law as Institutional Normative Order* (n 76) 101).

<sup>79</sup> Roger Cotterrell, ‘Why Jurisprudence is Not Legal Philosophy’ (2014) 5(1) *Jurisprudence* 41 at 42.

<sup>80</sup> Ibid 54. Antony Duff puts forward a similar perspective (see R A Duff, ‘Philosophy and “The Life of the Law”’ (2009) 26(3) *Journal of Applied Philosophy* 245).

<sup>81</sup> Dan Priel, ‘The High Church of Jurisprudence: An Essay for Oxford’ <<http://www.laws.ucl.ac.uk/wp-content/uploads/2016/10/High-Church-of-Jurisprudence-for-UCL.pdf>> accessed May 26 2017.

<sup>82</sup> Ibid 34-40.

reconstruction are justifying and critiquing law's institutional arrangements and political theory is the means for accomplishing these aims.<sup>83</sup>

These positions suffer from complementary difficulties: one focuses so intently on existing practices and values that it is incapable of moving past these and the other risks lapsing into irrelevance and dogmatism, depending on how moral and political philosophy are conceived (i.e. depending on the standard of certainty that is employed and whether they require *a priori* reasoning). The optimal position seems to be to adopt what I have described as an immanent-transcendent perspective by recognizing the necessity of strong evaluation, and the requirement for transcendent ideals that this entails, while acknowledging that these ideals are part of the world – part of a complete reality in which our mundane attempts to realize these ideals disclose something of their content as well as our ability to alter the world (albeit slowly and imperfectly) in accordance with them.<sup>84</sup> An examination of ideals in the world also demonstrates the dangers of asserting them with absolute certainty, however: of homogenizing cultures, discouraging tolerance and hindering new ways of thinking. It therefore demands certain humility in normative theorizing.

This humility must be tempered by belief in the possibility of ideals with substantive content and meaning that transcend space and time and by preserving a role for the theorist in striving to articulate and advocate these. This requires fine-grained contextual analysis that brings out the complex and deep meaning of concepts and practices at given points in history, but it also demands that an effort be made to extrapolate a sense of meaning that transcends these contexts. Understood like this, history is capable of providing a plurality of views while preserving a sense of enduring, aspirational, meaning in a way that other empirical disciplines, such as sociology, cannot.<sup>85</sup> Close contextual analysis is also required to fully appreciate the contemporary arrangements that form the subject of critique, evaluation and reform, and this also demands a sophisticated grasp of history. Without this, it is impossible to recognize and fully understand fragments of older ideas and practices that have endured.<sup>86</sup> Only when these two historically-informed endeavours come together can the strong evaluation that is needed to highlight deficiencies in existing practices and discourse and to make suggestions for improvement occur.

There is of course no need that these endeavours be undertaken simultaneously, though they might be undertaken by the same scholar. An example of this can be seen in the work of Norrie. In earlier work, Norrie concentrates on identifying and explaining the antinomies of contemporary 'Kantian' criminal justice thinking. This is of crucial importance (though greater historicism might alter the interpretation he offers<sup>87</sup>) but when these insights are directed towards explanatory

---

<sup>83</sup> Tadros (n 78).

<sup>84</sup> On the interdependence of 'realism' and idealism' see Martin Krygier, 'Tempering Power' in Maurice Adams et al (eds), *Constitutionalism and the Rule of Law: Bridging Idealism and Realism* (CUP 2017).

<sup>85</sup> See Andrew Sabl, 'History and Reality: Idealist Pathologies and 'Harvard School' Remedies' in Stears and Floyd (eds), *Political Philosophy versus History?* (n 9).

<sup>86</sup> See, for example, Benjamin L Berger, 'The Abiding Presence of Conscience: Criminal Justice Against the Law and the Modern Constitutional Imagination' (2011) 61 *University of Toronto Law Journal* 579 and Chloë Kennedy 'Declaring Crimes' (2017) OJLS doi: <https://doi.org/10.1093/ojls/gqx005>.

<sup>87</sup> According to Norrie, although his work 'has always been informed by an understanding of history' 'it is not of course history *per se* that is important, but the

and immanent critique<sup>88</sup> only, they are incapable of moving beyond the law's contemporary form and order. They are essential in 'diagnosing' the present, but they cannot be used to suggest radical change.<sup>89</sup> In later work, however, Norrie embraces the transcendent mindset and begins to engage with what I have described as the full range of normative theorizing. As in previous work, Norrie employs a socio-historical method to characterize our contemporary condition, finding both value and ethical barrenness in modern liberalism.<sup>90</sup> This assessment of course depends on the existence of a relatively stable sense of good with which to undertake such an evaluation and it is here that history begins to play a different role. Underpinning Norrie's assessment of liberalism is an interpretation of what humankind is like 'in itself' and 'in its history', i.e. comprised of beings with the potential to value freedom and solidarity, *and* with the capacity to negate existing states of affairs.<sup>91</sup> This conception of human nature emerges from instantiations of these capacities in history and from a philosophical anthropology that supports these capacities.<sup>92</sup> To be sure, the most radical and complete sense of freedom that is the ideal animating this account has never been realized within history but certain utopian moments – moments of revolutionary fervor – offer a glimpse of how we might transcend the present.<sup>93</sup>

As the example of Norrie shows, it is possible for scholars to embrace different mindsets in the course of different projects. His example also shows that a transcendent mindset is essential to the full range of normative theorizing. In terms of what this transcendent mindset looks like, the shortcomings of understanding the world as decoupled from some transcendent realm suggests that it is advisable for scholars to aim for an integrated transcendent mindset, one that accepts the possibility of foundations that can transcend space and time and the possibility that lived history might offer insight into their nature. There is no escaping that these are unpopular notions, though, which defy the contemporary divide between empirical reality and a transcendent realm of meaning, and the priority that is commonly afforded to the

---

understanding of law as a socio-historical phenomenon' (Alan Norrie, *Punishment, Responsibility, and Justice: A Relational Critique* (OUP 2000) 227). Doubts over the alleged Kantian dimension of English criminal justice thinking (see Markus Dirk Dubber, 'Alan W Norrie, Punishment, Responsibility, and Justice: A Relational Critique' (2002) *MLR* 65(2) 309) and whether it can speak for 'Western' criminal law more generally point towards a possible need for greater attention to history *per se* (for problems with this latter point, see S N Eisenstadt, 'Multiple Modernities' (2000) 129(1) *Daedalus* 1).

<sup>88</sup> Norrie, *Punishment, Responsibility, and Justice* (n 87) 45.

<sup>89</sup> Bowring notes this limitation (Ben Bowring, 'Punishment, Responsibility, and Justice. A Relational Critique by Alan Norrie' (2002) 29(3) *Journal of Law and Society* 521).

<sup>90</sup> Norrie, 'Law, Ethics and Socio-History' (n 21) 62.

<sup>91</sup> Ibid 66-70. For a fuller exploration of Norrie's more recent, transformative work see Alan Norrie, *Dialectic and Difference: Dialectical Critical Realism and the Grounds of Justice* (Routledge 2010).

<sup>92</sup> Norrie, 'Law, Ethics and Socio-History' (n 21) 69.

<sup>93</sup> Ibid 74.

former.<sup>94</sup> In light of this, the more ‘realistic’ lesson of this paper is that as long as scholars tend to work with this divide even implicitly in mind there will be a tendency to collapse scholarly inquiry into whichever mindset is favoured by the researcher. This has unavoidably negative consequences for any attempt to engage with, or critique, scholarship that is written by scholars on the other side of the divide or indeed scholarship that regards the divide as spurious. We should therefore not be surprised that Lacey and Ferzan end up talking past one another, even when they both rely on history: they are talking past one another from opposing sides of an unbreached divide.

Realizing this has implications for the way that any challenge to theory by history is framed. Recent scholarship has convincingly pointed towards some difficulties associated with normative theorizing when it is wholly inattentive to institutional and historical context. The problem is that by doing so in a way that encourages an immanent mindset, it forecloses the possibility of full normative engagement and leaves its critical targets unscathed. Perhaps more importantly, it risks undermining the value that history does and can hold for normative theorizing. If it is true that legal philosophy has been the dominant voice in normative legal theory, we should ask searching questions as to why this is so. To take an example from criminal law theory, Loughnan suggests that ‘their [legal-philosophical approaches] dominance has so far influenced the scholarly debate on criminal responsibility that the insights generated by socio-historical research tend to be, in effect if not by intention, pushed into a scholarly corner – as lacking weighty analytical purchase, or, because such assessment is interpretive rather than normative, of marginal significance or interest only’.<sup>95</sup> Could it be that historically-minded scholars are complicit in this marginalization? Socio-historical research that works to reduce the normative horizon runs up against the enduring need for transcendence that is a stable feature of the human experience. Its potency as a critique of *a priori* normative theorizing is therefore revealed to be overstated. At the same time, by casting this type of research as interpretive *rather than* normative, the possibility that history might fulfill different roles is occluded. Again, the path to remaining oriented towards transcendence and attentive to immanent concerns is blocked.

At present, attempts to be both transcendentally minded and immanently grounded seem most often to result in either a retreat into the pursuit of disengaged, transcendent meaning or an equally myopic examination of the immanent world that closes off transcendence altogether. Whilst the preferred situation would be to adopt a more integrated immanent-transcendent perspective, this requires a degree of pliability – the ability to see the undeniably formative force of context without losing sight of the deeper senses of unity that run across space and time – that is difficult to attain, especially under modern conditions. Despite the difficulties, this should be the ambition of all scholars who are concerned with normative questions. Failing this, the very least that is required is an explicit awareness of one’s metaphysical commitments and a considered awareness of their full implications. This is an essential step to meaningful discussion – collaborative or critical – both in and across legal history and legal theory.

---

<sup>94</sup> As suggested by the separation between empirical, descriptive and normative projects within modern legal scholarship, with the latter facing neglect (van der Burg, ‘Audacious, Fully Armed Scholars’ (n 16).

<sup>95</sup> Arlie Loughnan, ‘Historicizing Criminal Responsibility’ in Flanders and Hoskins (n 6) 141.